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In the

Supreme Court of the United States

October Term, 1970

No. 70-178

Nick F. DeMartino and Jean DeMartino,

Appellants,

v.

Olga Scarpetta and Spence-Chapin Adoption Service,

Appellees.

On Appeal from the Court of Appeals of New York

JURISDICTIONAL STATEMENT

Jacob D. Fuchsberg
Irving Lemov
250 Broadway
N.Y., N.Y. 10007
WO. 2-2800

FUCHSBERG & FUCHSBERG
Attorneys for
Appellants
250 Broadway
New York, N.Y. 10007
Tel.: WO 2-2800

Leo Pfeffer
15 East 84th Street
New York, N.Y. 10028
TR. 9-4500
COUNSEL FOR APPELLANTS

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No.

Nick F. DeMartino and Jean DeMartino,

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v.

Olga Scarpetta and Spence-Chapin Adoption Service,

Appellees.

Jurisdictional Statement

Appellants appeal from so much of the final judgment or order of the Court of Appeals of New York, entered in the Office of the Clerk of the New York Court of Appeals on February 18, 1971, as denied the application of the appellants for leave to intervene as parties in the appeal pending before the New York Court of Appeals, wherein the appellee Spence-Chapin Adoption Agency Service (hereinafter Spence-Chapin) appealed to the Court of Appeals from an order of the Appellate Division of the Supreme Court, First Department, entered January 28, 1971, affirming an order and judgment of the Supreme Court,

entered April 7, 1971.[1] The Notice of Appeal with due proof of service on the Attorneys for Appellees (Appendix B, infra) was filed in the Office of the Clerk of the Court of Appeals of New York State on May 8, 1971, and in the office of the Clerk of the Supreme Court, State of New York, County of New York, on May 13, 1971.

The jurisdiction of this Court to review the order and judgment below is conferred by Title 28 U.S.C. section 1257 (2). McCollum v. Board of Education, 333 U.S. 203, 206 (1948).

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1. As a precautionary measure appellants have made a motion to the New York Court of Appeals to amend the order denying intervention and its remittitur to add the following:

> In denying the application of Nick F. DeMartino and Jean DeMartino for intervention there was presented to this Court and this Court necessarily passed upon a question under the Constitution of the United States whether such denial deprived the DeMartinos of a protected interest as contemplated by the Fourteenth Amendment to the United States Constitution.

This motion is now pending.

Question Presented

The question presented by this appeal is whether in a proceeding by a natural mother to regain custody of a child voluntarily surrendered by her for adoption, a state court, acting under authority of a State Statute, can consistently with the Due Process Clause of the Fourteenth Amendment, refuse to allow the couple to whom the surrender was made to intervene in order to defend their right to retain custody and to challenge the claim of the natural mother for return of custody.

Statute Involved

Appellants challenge the constitutionality of Section 383 and 384 of the Social Welfare Law and Sections 112 and 114 of The Domestic Relations Law of New York as construed in the present case by the New York Court of Appeals. These sections are reprinted herein as Appendix C to this Jurisdictional Statement.

Constitutional Provisions Involved

The Fourteenth Amendment to the Constitution of the United States provides in part that "...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

The only defendant in the habeas corpus proceeding was Spence-Chapin, who responded to the writ and proceeded to trial before New York Supreme Court Justice Ascione. At the conclusion of the trial, Justice Ascione directed a judgment in favor of Miss Scarpetta, adjudging that custody of the child be delivered to her.

Appellants, upon discovery of the New York Supreme Court's determination as to custody, made application, successively to Justice Ascione and to the Appellate Division, First Department, for leave to intervene in the proceeding. The applications were rejected. After the Appellate Division had affirmed the judgment in the habeas corpus proceeding, application for leave to appeal to the Court of Appeals was made by Spence-Chapin, at which time appellants made application to that court for leave to intervene. The Court of Appeals denied appellants' application, granted the application of Spence-Chapin for leave to appeal and permitted appellants merely to file a brief amicus curiae.[2/] No opinion accompanied the decision on the motion.

About a month later (April 7, 1971) the Court of Appeals affirmed the decision of the Appellate Division in

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2. In their brief appellants asserted that denial of intervention violated the Due Process Clauses of both the Federal and State constitutions.(Point II, pp. 12-15).

the habeas corpus proceeding with an opinion. (Appendix A, infra). On the constitutional question of appellants rights to be heard, the Court said:

> "Similarly, we find no merit to the contention that the failure to allow the prospective adoptive parents to intervene in the instant proceeding deprived them of due process of law so as to render the Court's determination awarding custody of the child to the mother, constitutionally invalid. The prospective adoptive parents do not have legal custody of the baby. Spence-Chapin, the adoption agency, by virtue of the mother's surrender, was vested with legal custody. (Social Welfare Law, §383[2], see also, Matter of Jewish Child Care Assn., 5 N.Y. 2d, 222, 229). The agency, in turn, had placed the baby with the prospective adoptive parents pursuant to an arrangement reached between them, for the purpose of prospective adoption of the child. This arrangement is, of course, subject to our adoption statutes, and in no ways conveys any vested rights in the child to the prospective adoptive parents. (See, e.g., Domestic Relations Law, §§ 112, 114). It follows, therefore, that, in not being permitted to intervene, they are not deprived of a protected interest, as contemplated by the constitution."

On April 8, 1971, appellants instituted an independent action in the United States District Court for the Southern District of New York under U. S. C. Title 42, Section 1983 for declaratory judgment and injunctive relief. The graveman of the complaint was that under color of New York Law, as interpreted by the New York courts, custody of the child was about to be taken from appellants by Miss Scarpetta and Spence-Chapin, defendants in the action, without notice to appellants or an opportunity to be heard, in violation of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. The District Court dismissed the action on the ground that the decision of the New York Court of Appeals constituted a bar to the action by reason of res judicata and suggested, instead, that "plaintiffs' remedy is by way of appeal or certiorari to the United States Supreme Court." (The District Court's opinion is reprinted herein as Appendix D, infra.)

An appeal from the District Court decision was taken and is now pending in the Court of Appeals for the Second Circuit. However, in order to preserve their rights in the event the District Court's decision is affirmed, appellants bring this appeal in conformance with the District Court's opinion.

The Question is Substantial

In their brief amicus curiae to the New York Court of Appeals, appellants quoted (at p. 15) the following statement of Mr. Justice Stone for the Court in Hansberry v. Lee, 311 U. S. 32, 40-41 (1940):

> "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party by service of process. Pennoyer v. Neff, 95 U.S. 714; 1 Freeman on Judgments (5th ed.), §407. A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States, R. S. §905, 28 U.S.C. §687, prescribe, Pennoyer v. Neff, supra; Lafayette Ins. Co. v. French, 18 How. 404; Hall v. Lanning, 91 U. S. 160; Baker v. Baker, Eccles & Co., 242 U.S. 394; and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require. Postal Telegraph Cable Co. v. Newport, 247 U.S. 646; Old Wayne Mutual Life Assn. v. McDonough, 204 U. S. 8."

It was on the basis of this decision and many others that appellants brought their independent suit under Title 42 Section 1983 of the United States Code. We believe that because appellants were not parties to the suit between Miss Scarpetta and Spence-Chapin they could not be bound under the principle of res judicata by any determination made in that suit. Hence, it is our view that the District Court erred in dismissing the 1983 suit.

However, independently of that question, we submit that the New York courts' refusal to allow appellants to intervene in the habeas corpus proceeding itself violated the Due Process Clause of the Fourteenth Amendment. This is clear from this Court's unanimous decision in Armstrong v. Manze, 380 U. S. 545 (1965). In that case the Court held violative of the Due Process Clause an adoption by a step-father without notice to the divorced father who had not contributed to the child's support for more than two years prior to the adoption. Moreover, the Court held that the defect was not cured by the fact that, after learning of the adoption and moving to vacate it, the natural father was accorded a hearing at which he sought (unsuccessfully) to show that he had not failed to contribute to the child's support "commensurate with his financial ability" as required by the statute. In its opinion the court said (380 U.S. 549-550):

"The questions before us are whether failure to notify the petitioner of the pendency of the adoption proceedings deprived him of due process of law so as to render the adoption decree constitutionally invalid, and, if so, whether the subsequent hearing on the petitioner's motion to set aside the decree served to cure its constitutional invalidity.

"In disposing of the first issue, there is no occasion to linger along. It is clear that failure to give the petitioner notice of the pending adoption proceedings violated the most rudimentary demands of due process of law. Many controversies have raged about the cryptic and abstract words of the 'Due Process Clause', but there can be no doubt that a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, at 313:

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all

> the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Citing cases]. Id., at 314. Questions frequently arise as to the adequacy of a particular form of notice in a particular case. [Citing cases]. But as to the basic requirement of notice itself, there can be no doubt where, as here, the result of the judicial proceeding was permanently to deprive a legitimate parent of all that parenthood implies."

Nor, the Court held, could the basic defect be cured by a post-trial hearing.

> "A fundamental requirement of due process [the Court said] is "the opportunity to be heard." Grannis vs. Ordean, 234 U. S. 385, 394. It is an opportunity which must be granted at a meaningful time and in a meaningful manner. The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place. His motion should have

been granted (380 U.S. 552)."

It is true that Armstrong was the natural parent of the child, whereas the appellants are only prospective adoptive parents. Yet this distinction is not critical, for the constitutional question does not rest upon the relative weight of the interest of a natural parent as compared to that of an adoptive parent, but whether in either case an interest is possessed which is entitled to due process protection. Moreover, in the following instances the present case is even stronger than Armstrong v. Manzo.

(a) At the time of the challenged legal proceeding (the adoption in Armstrong, the habeas corpus in the present case), Armstrong did not have actual custody of the child, whereas the appellants had actual and lawful custody.

(b) Armstrong had been deprived of custody in a (divorce) proceeding which was in accord with the requirements of due process, i.e., notice and opportunity to defend. The appellants have had no notice or opportunity to defend their claim to continuance of custody.

(c) Armstrong was accorded a post-trial hearing. The appellants have been denied even a post-trial hearing by the trial court, the Appellate Division and the Court of Appeals, and still have not had it.

(d) Armstrong forfeited his rights of parenthood by failing to support his child for two years. The appellants, to the contrary, have been the sole source of care and support (and love) of this child, and have done nothing to destroy or impair their rights.

(e) Armstrong never consented to the adoption of his child. In the present case, Miss Scarpetta voluntarily and deliberately, without duress or undue influence, consented to the adoption.

The New York Court of Appeals based its decision on the ground that the appellants did not have "legal custody" of the child, which under New York law was vested in Spence-Chapin, and that accordingly they do not have "a protected interest" under the Due Process Clause. But neither did Armstrong have legal custody of the child involved in that case. Moreover, we do not believe that right to notice and opportunity to defend is limited to persons having "legal custody" of a child. Whether technically "legal" or not, appellants' custody of the child had been acquired in full conformance to New York law and remained lawful until such time as it was adjudged unlawful in a judicial proceeding which complied with the requirements of due process of law, specifically notice and an opportunity to defend.

In Goldberg v. Kelly, 397 U.S. 254 (1970) the Court stated (at 262-263) "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.'"

We need hardly emphasize that the decision of the New York courts have "condemned" appellants to "suffer grievous loss."

Conclusion

The federal question presented by this appeal is substantial. It is therefore respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

Jacob D. Fuchsberg
Leo Pfeffer
Irving Lemov

Counsel for Appellants.

APPENDIX A

Opinion of the Court of Appeals State of New York

STATE OF NEW YORK
COURT OF APPEALS

T. No. 79. 71

The People &c., ex rel. Olga Scarpetta on behalf of Baby Scarpetta,

Respondent,

vs.

Spence-Chapin Adoption Service,

Appellant.

JASEN, J.:

This appeal involves the return of an out-of-wedlock infant to its natural mother after she had executed a purported surrender of the child to an authorized adoption agency. The case does not involve the undoing of an adoption or the return of an adopted child to its natural parent. Nor does the case involve the undoing of a surrender by the natural mother on her mere say-so, but rather the undoing is based on a finding of fact that for various reasons, some obvious, the surrender was not made by her with such stability of mind and emotion that the surrender should not be undone for improvidence. On the other hand, there is not the slightest suggestion that the adoption agency was unfair or guilty of any overreaching in obtaining the surrender.

It is or should be obvious that the surrender of a child by its parent, whatever the circumstances or reason, has elements of tragedy in it and that

pain, feelings of guilt, and suffering will not be avoided whatever course is taken. And, of course, the foster parents who hope to adopt the child are necessarily touched by the tragedy, guiltless and otherwise uninvolved though they be, if perchance the child is wrested from them on the annulling of a surrender.

A further consideration turns on this court's limited power of review. Where, as here, findings of fact are affirmed by the Appellate Division in a civil matter, the court is bound, by constitutional mandates, to accept those facts. Only questions of law are left for its review. As a consequence, any findings of fact involved in the rendering of the surrender, turning on the mother's then state of mind, or on her fitness to rear her child, are before this court as immutable premises, from which it may only start its review of the applicable questions of law.

The infant child was born on May 18, 1970, to Olga Scarpetta, who was unmarried and thirty-two years old. She had become pregnant in her native Colombia by a married Colombian in the summer of 1969. Seeking to minimize the shame of an out-of-wedlock child to herself and her family, Miss Carpetta came to New York for the purpose of having her child. She was well acquainted with this country and its language. She had had her early schooling in New Jersey and her college education in California. Indeed, she had been trained in the social sciences.

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Four days after the birth of the child, she placed the infant for boarding care with Spence-Chapin Adoption Service, an agency authorized by statute to receive children for adoption. Ten days later, a surrender document was executed by Miss Carpetta to the agency, and on June 18, 1970, the baby was placed with a family for adoption. Five days later, on June 23, 1970, the mother repented her actions and requested that the child be returned to her.

After several unsuccessful attempts to regain her child from the agency, the mother commenced this habeas corpus proceeding. Before the surrender, the mother had had a number of interviews with representatives of the adoption agency. On the other hand, shortly before or after the birth of the child, her family in Colombia, well-to-do, and devout in their religiion, were shocked that she should put out her child for adoption by strangers. They assured her of their support and backing and urged her to raise her own child.

Special Term, "after considering all the facts", concluded "that the child should be forthwith returned to petitioner, its natural mother". Following unanimous affirmance by the Appellate Division, we granted leave to appeal.

The resolution of the issue of whether or not a mother, who has surrendered her child to an authorized adoption agency,

may regain the child's custody, has received various treatment by the legislatures and courts in the United States.[1] At one extreme, several jurisdictions adhere to the rule that the parent has an absolute right to regain custody of her child prior to the final adoption decree.[2] On the other hand, some jurisdictions adhere to the rule that the parent's surrender is final, absent fraud or duress.[3] The majority of the jurisdictions, however, place the parent's right to regain custody within the discretion of the court[4] -- the position which,

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[1] See, Katz, Law of Adoption, 51 Geo. L.J. 64, 87; Comment, Revocation of Parental Consent to Adoption: Legal Doctrine and Social Policy, 28 U. Chi. L. Rev. 564.

[2] See e.g., In re Baby Girl Larson, 252 Minn. 490, but cf. Minn. Stat. § 259.24[6], [1967]; S. D. Code tit. 14, § 14.0406[1939]. In North Carolina and Tennessee, the right is continuous up until a certain period of time before the issuance of the final decree. (N.C. Gen. Stat., § 48-11 [1966]; Tenn. Code Ann., §36-117 [1962].)

[3] See, e.g., Catholic Charities v. Harper (161 Tex. 21); Gonzales v. Toma (330 Mich. 35); La. Rev. Stat. Ann. tit. 9, § 404 (1965).

[4] See, Katz (supra), n. 1 at 88.

of course, our legislature has taken. The discretionary rule allows the court leeway to approve a revocation of the surrender when the facts of the individual case warrant it and avoids the obvious dangers posed by the rigidity of the extreme positions.[5]

In New York, a surrender executed by a mother, in which she voluntarily consents to a change of guardianship and custody to an authorized agency for the purpose of adoption, is expressly sanctioned by law. (Social Services Law, §384).[6]

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[5] See, Katz (supra), n.1 at 89-90; Clarke, Social Legislation, 320 [2d ed., 1957); U.S. Children's Bureau, Essentials of Adoption Law and Procedure 14 (Publication No. 331, 1949).

[6] The agency is charged thereafter with the care and supervision of the child, unless the child is adopted. (Social Services Law, §383[2]; see, People ex rel. Anonymous v. Perkins Adoption Society, 271 App. Div. 672, 674.)

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The statute nowhere endows a surrender with irrevocability foreclosing a mother from applying to the court to restore custody of the child to her. In fact, the legislation is clear that, until there has been an actual adoption[7], or the agency has met the requirements of the Social Services Law §384[4])[8], the surrender remains under, and subject to, judicial supervision.

Inherent to judicial supervision of surrenders is the recognition that documents of surrender are unilateral, not contracts or deeds, and are almost always executed under circumstances which

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[7] Domestic Relations Law, section 112(6) provides: "Where the adoptive child is less than eighteen years of age, no order of adoption shall be made until such child has resided with the adoptive parents for at least six months unless the judge or surrogate in his discretion shall dispense with such period of residence and shall recite in the order the reason for such action."

[8] Social Services Law, section 384: "4. Upon petition by an authorized agency, a surrogate or judge of the family court may approve such surrender, on such notice to such persons as the surrogate or judge may in his discretion prescribe. No person who has received such notice and been afforded an opportunity to be heard may challenge the validity of a surrender approved pursuant to this subdivision in any other proceeding. However, this subdivision shall not be deemed to require approval of a surrender by a surrogate or judge for such surrender to be valid."

may cast doubt upon their voluntariness or on understanding of the consequences of their execution. Indeed, no one could reasonably urge that the legislature enact a statute or that a court decide that the natural mother be prevented from establishing that her surrender was not the voluntary act of a competent person. Of necessity, therefore, there is always an issue about the fact of surrender, document or no document. On the other hand, the courts have the strongest obligation not to permit surrenders to be undone except for the weightiest reasons. And, to reflect such a view, "the legislature has gone to great pains to circumscribe, in connection with adoption, the rights of parents who have surrendered their child to an authorized agency, and * * * has gone to equal pains to define their rights to custody prior to adoption. The related statutes, which are at least presumptively an embodiment of the social judgment and consequence of the community, form a well integrated, compact and uncomplicated procedure, which bears the impress of careful thought and intelligent planning." (People ex rel. Grament v. Free Synagogue Child Adoption Committee, 194 Misc. 332, 336.)

Having the power to direct a change of custody from the agency back to the natural parent, notwithstanding the document of surrender, the court should exercise it only when it determines "that the interest of such child will be promoted thereby and that such parent is fit, competent and able to duly maintain, support and educate such child." (Social

Services Law, § 393[1].)[9]

Accordingly, the sole issue before us on this appeal is whether there is any evidence in the record to establish that the interest of the child will be promoted by returning the child to the natural mother.

It has repeatedly been determined, insofar as the best interests of the child are concerned, that "[t]he mother or father has a right to the care and custody of a child, superior to that of all others, unless he or she has abandoned that right or is proved unfit to assume the duties and privileges of parenthood." (People ex rel. Kropp v. Shepsky, 305 N. Y. 465, 468; see, People ex rel. Anonymous v. Anonymous,

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[9] Social Services Law, section 383(1):

"The parent of a child remanded or committed to an authorized agency shall not be entitled to the custody thereof, except upon consent of the court, public board, commission, or official responsible for the commitment of such child, or in pursuance of an order of a court or judicial officer of competent jurisdiction, determining that the interest of such child will be promoted thereby and that such parent is fit, competent and able to duly maintain, support and educate such child. The name of such child shall not be changed while in the custody of an authorized agency."

10 N Y 2d 332, 335; People ex rel. Portnoy v. Strasser, 303 N. Y. 539, 542; People ex rel. Beaudoin v. Beaudoin, 193 N. Y. 611, affg. 126 App. Div. 505; Matter of Livingston, 151 App. Div. 1, 7; cf. Matter of Gustow, 220 N. Y. 373.) It has been well said that "the status of a natural parent" is so important that in determining the best interests of the child, it may counter-balance, even outweigh, superior material and cultural advantages which may be afforded by adoptive parents * * * * For experience teaches that a mother's love is one factor which will endure, possibly endure after other claimed material advantages and emotional attachments may have proven transient." (People ex rel. Grament v. Free Synagogue Child Adoption Committee, supra, at 337, 338.) And, indeed, as recently as 1963, the legislature expressed its approval of this "decisional rule that between parent and non-parent, the parent is preferred." (Report of Joint Legislative Committe on Matrimonial and Family Laws [1963], Leg. Doc. No. 34, p. 91.)

The primacy of status thus accorded the natural parent is not materially altered or diminished by the mere fact of surrender under the statute, although it is a factor to be considered by the court. To hold, as the agency suggests -- that a surrender to an authorized adoption agency constitutes, as a matter of law, an abandonment -- would frustrate the policy underlying our legislation (Social Services Law, § 383[1]), which

allows a mother to regain custody of her child, notwithstanding the surrender to the agency, provided, of course, that there is some showing of improvidence in the making of the surrender, that the interest of such child will be promoted and "that such parent is fit, competent and able to duly maintain, support and educate such child." Nor do we perceive any distinction, in principle, between the effect of a surrender to an authorized agency and of a surrender to an individual. "The policy urged that, if surrender may be undone, authorized agencies will be inconvenienced or even frustrated in their placement of children is not a sufficient counterweight. The fact of relationship between a natural parent and child ought not to be subordinated to such considerations, important as they are." (People ex rel. Anonymous v. N. Y. Foundling Hosp., 17 A D 2d 122, 125, affd. 12 N Y 2d 863.)

Consequently, to give the fundamental principle meaning and vitality, we have explicitly declared that "[e]xcept where a nonparent has obtained legal and permanent custody of a child by adoption, guardianship or otherwise, he who would take or withhold a child from other or father must sustain the burden of establishing that the parent is unfit and that the child's welfare compels awarding its custody to the nonparent." (People ex rel. Kropp v. Shepsky,

supra, at 469.)[10] In determining fitness, it is obvious that a mother who is "a drunkard, an incompetent, a notoriously immoral person, cruel or unkind towards [her] child" (Matter of Gustow, 220 N. Y. 373, 377), or whose conduct evinces indifference or irresponsibility (Matter of Cleaves, 6 A D 2d 138) would not be a proper person to assume the duties of motherhood. Another significant factor to be considered is the "motivation of the mother in seeking return of the child.

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[10] And, in our later decision in People ex rel. Anonymous v. Anonymous (supra, at 335), we rote, in like fashion, that "where the contest for the custody of a child is between parent and nonparent, 'the primacy of parental rights may not be ignored' (People ex rel. Kropp v. Shepsky, 305 N. Y. 465, 469, supra), but it has never been held or suggested that the child's welfare may ever be forgotten or disregarded. In other words, the law presumes that it is in the child's best interests that he be raised by his natural parent, but this presumption fails when it is proved that the parent has abandoned the child or is not fit to rear him. 'The mother or father has a right to the care and custody of a child, superior to that of all others, unless', we pointed out in the Kropp case (305 N. Y. at 468), 'he or she has abandoned that right or is proved unfit to assume the duties and privileges of parenthood."

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It is recognized that very often there is a substantial risk of improper motivation. In such ase the authorized agency and the court must be especially alert not to permit the improper motivation to endanger the interests of the child or lead to any other noxious consequence. As important as this factor is, however, it is also true that the change of mind by a natural mother is not an evil thing. Instead, the change of mind is to be accorded great sympathy, and, in a proper case, encouragement and favorable action." (People ex rel. Anonymous v. N. Y. Foundling Hosp., supra.)

In no case, however, may a contest between a parent and nonparent resolve itself into a simple factual issue as to which affords the better surroundings, or as to which party is better equipped to raise the child. (People ex rel. Portnoy v. Strasser, 303 N. Y. 539.) It may well be that the prospective adoptive parents would afford a child some material advantages over and beyond what the natural mother may be able to furnish, but these advantages, passing and transient as they are, cannot outweigh a mother's tender care and love unless it is clearly established that she is unfit to assume the duties and privileges of parenthood.

We conclude that the record before us supports the finding by the courts below that the surrender was improvident and

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that the child's best interest -- moral and temporal -- will be best served by its return to the natural mother.

Within twenty-three days after the child had been given over to the agency, and only five days after the prospective adoptive parents had gained provisional custody of the child, the mother sought its return. If the matter had been resolved at that time, much heartache and distress would have been avoided. However, since the child was not returned, the mother had no alternative but to commence legal proceedings to regain its custody, and this she did without delay.

In revoking the surrender and directing the return of the child to the mother, the trial court held that the mother was "motivated solely by her concern for the well-being of her child." Moreover, the evidence fully supports the conclusion that the mother "has adequately stabilized her own relationship and has become stable enough in her own mind to warrant the return of the child to her." No finding of present or prospective unfitness has been made against the mother. On the contrary, the record discloses that she is well educated, financially secure, and in a position to properly assume the care, training and education of her child.

Concluding as we do that the record supports the determination that the child's interests will be promoted by the award of its custody to the mother, we turn to the remaining issue of whether

the prospective adoptive parents were entitled to intervene in this proceeding, as a matter of law, pursuant to CPLR 1012(a)(2).

It cannot be doubted that the public policy of our state is contrary to the disclosure of the names and identities of the natural parents and prospective adoptive parents to each other.[11] Sections 383 and 384 of the Social Services Law are also reflective of this settled public policy. Since the relationship under section 384 is exclusively between the parent or parents and the adoption agency, and the legislature has not deemed it appropriate for the prospective adoptive parents to be parties to the proceeding pursuant to section 383, the agency acts as an insulating intermediary, ensuring by the separation of the natural parents and prospective adoptive parents the secrecy necessary to prevent the strife and harassment that could be caused by a parent who institutes a proceeding merely to learn the identify of the prospective adoptive parents.

To allow the prospective adoptive parents to intervene as a matter of right, thereby assuming all the rights of other parties to the action, would necessarily lead to disclosure of the names of the natural

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[11] See, e.g., sections 111(4) and 112(4) of the Domestic Relations Law.

parents and prospective adoptive parents to each other. In view of the statutory scheme enacted by the legislature, and the settled public policy, we are unwilling to hold that the prospective adoptive parents are entitled to intervene.

Similarly, we find no merit to the contention that the failure to allow the prospective adoptive parents to intervene in the instant proceeding deprived them of due process of law so as to render the court's determination awarding custody of the child to the mother, constitutionally invalid. The prospective adoptive parents do not have legal custody of the baby. Spence-Chapin, the adoption agency, by virtue of the mother's surrender, was vested with legal custody. (Social Services Law, §383[2]; see also, Matter of Jewish Child Care Assn. 5 N Y 2d 222, 229.) The agency, in turn, had placed the baby with the prospective adoptive parents pursuant to an arrangement reached between them, for the purpose of prospective adoption of the child. This arrangement is of course, subject to our adoption statutes, and in no ways conveys any vested rights in the child to the prospective adoptive parents. (See, e.g., Domestic Relations Law, §§112, 114.) It follows, therefore, that, in not being permitted to intervene, they are not deprived of a protected interest, as

contemplated by the Constitution.

The order of the Appellate Division should be affirmed, without costs.

* * * * * * * * * * *

Order affirmed, without costs. Opinion by Jasen,J. All concur.

APPENDIX A-1

Order of the Court of Appeals State of New York

STATE OF NEW YORK,
In Court of Appeals
At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Eighteenth day of February A.D. 1971.

PRESENT, HON. STANLEY H. FULD,
Chief Judge, presiding

---

1 Mo. No. 117
The People &c. ex rel. Olga Scarpetta on behalf of Baby Scarpetta,

Respondent,

vs.

Spence-Chapin Adoption Service,
Appellant.

A motion having heretofore been made upon the part of Nick F. and Jean DeMartino for leave to intervene as parties on the appeal herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied; the movants De Martino may, however, file a brief amici curiae if they be so advised.

(SEAL) A copy Gearon Kimball
Deputy Clerk.

APPENDIX B

Notice of Appeal

COURT OF APPEALS
STATE OF NEW YORK

----------x

THE STATE OF NEW YORK, ex rel.
OLGA SCARPETTA,

On behalf of BABY SCARPETTA,

Petitioner-Respondent

-against-

SPENCE-CHAPIN ADOPTION SERVICE,

Respondent-Appellant.
----------x

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given that NICK F. DeMARTINO and JEAN DeMARTINO, hereby appeal to the Supreme Court of the United States, from the final order or judgment of the Court of Appeals of the State of New York, entered in the Office of the Clerk of the New York Court of Appeals on February 18, 1971, which denied the application of NICK F. DeMARTINO and JEAN DeMARTINO for leave to intervene as parties in the Appeal pending before the New York State Court of Appeals, wherein SPENCE-CHAPIN ADOPTION SERVICE appealed to the Court of Appeals from an order of the Appellate Division of the Supreme Court, First Department, entered January 28, 1971, affirming an order and judgment of the Supreme Court, New York County, entered on November 24, 1970, which granted custody of the infant SCARPETTA

APPENDIX B

Notice of Appeal

to OLGA SCARPETTA (Petitioner-Respondent herein).

FURTHER NOTICE is given that said DeMARTINOS intend to bring up for review in the United States Supreme Court so much of the order and remittitur of the Court of Appeals entered April 7, 1971, affirming the order and judgment below as may bear upon the question presented on this Appeal, whether the Statutes of the State of New York drawn in question here, are repugnant to the Constitution of the United States.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Dated: New York, N.Y.
May 5, 1971

FUCHSBERG & FUCHSBERG
Attorneys for Appellants
in the U.S. Supreme Court
NICK F. DE MARTINO and JEAN DE MARTINO
250 Broadway
New York, N.Y. 10007

TO: CLERK OF COURT OF APPEALS
Albany, New York

SIMPSON, THACHER & BARTLETT, ESQS.
Attorneys for Appellee in the U.S. Supreme Court
SPENCE-CHAPIN ADOPTION SERVICE
One Battery Park Plaza
New York, N.Y.

APPENDIX B

Notice of Appeal

ZALK, RUBEL & PERRET, ESQS.
Attorneys for Appellee in the U.S.
Supreme Court
OLGA SCARPETTA
200 West 57th Street
New York, N.Y. 10019

APPENDIX C

Social Welfare Law of the State of New York (McKinney's Consolidated Laws of New York, Book 52-A).

§ 383. CARE AND CUSTODY OF CHILDREN

1. The parent of a child remanded or committed to an authorized agency shall not be entitled to the custody thereof, except upon consent of the court, public board, commission, or official responsible for the commitment of such child, or in pursuance of an order of a court or judicial officer of competent jurisdiction, determining that the interest of such child will be promoted thereby and that such parent is fit, competent and able to duly maintain, support and educate such child. The name of such child shall not be changed while in the custody of an authorized agency.

2. The custody of a child placed out or boarded out and not legally adopted or for whom legal guardianship has not been granted shall be vested during his minority, or until discharged by such authorized agency from its care and supervision, in the authorized agency placing out or boarding out such child and any such authorized agency may in its discretion remove such child from the home where placed or boarded. L.1940, c. 619, §3, eff. March 1, 1941.

APPENDIX C

Portions of Social Welfare Law of the State of New York (McKinney's Consolidated Laws of New York, Book 52-A).

§ 384. GUARDIANSHIP OF DESTITUTE OR DEPENDENT CHILDREN

1. Method. The guardianship of the person and the custody of a destitute or dependent child may be committed to an authorized agency either by an order of the surrogate or judge of the family court as hereinafter provided or by a written instrument which shall be known as a surrender, and signed:

* * * * * * *

2. Terms. Such guardianship shall be in accordance with the provisions of this article and the instrument shall be upon such terms, for such time and subject to such conditions as may be agreed upon by the parties thereto. If one of the purposes of such surrender is the adoption of such child from such authorized agency the instrument shall make specific provision therefor and it may recite that the authorized agency is thereby authorized and empowered to consent to the adoption of such child in the place and stead of the person signing the instrument, and that the person signing the instrument waives any notice of such adoption; it may also provide for the absolute surrender of such child to such authorized agency. But no such agency shall draw or receive money from public funds for the support of any such child except upon the written

APPENDIX C

Portions of Social Welfare Law of the State of New York (McKinney's Consolidated Laws of New York, Book 52-A).

order or permit of the officer or board legally exercising the powers of a public welfare official of the county, city or town sought to be charged with the support of such child.

* * * * * *

3. Whenever the term surrender or surrender instrument is used in any law relating to the adoption of children, it shall mean and refer exclusively to the instrument hereinabove described for the commitment of the guardianship of the person and the custody of a child to an authorized agency by his parents, parent or guardian; and in no case shall it be deemed to apply to any instrument purporting to commit the guardianship of the person or the custody of a child to any person other than an authorized agency.

4. * * * * * * *

Upon petition by an authorized agency, a surrogate or judge of the family court may approve such surrender, on such notice to such persons as the surrogate or judge may in his discretion prescribe. No person who has received such notice and been afforded an opportunity to be heard may challenge the validity of a surrender approved pursuant to his subdivision in any other proceeding. However, this subdivision shall not be deemed to require approval of a surrender by a surrogate or judge for such surrender to be valid.

APPENDIX C

Portions of Domestic Relations Law -- State of New York (McKinney's Consolidated Laws of New York (Book 14)).

§ 112. GENERAL PROVISIONS RELATING TO ADOPTION FROM AUTHORIZED AGENCIES.

In an adoption from an authorized agency the following requirements shall be observed:

* * * * * *

3. The authorized agency must present to such judge or surrogate a schedule to be annexed to the petition which shall be verified by a duly constituted official of the authorized agency having custody of the adoptive child or actually placing the child for adoption and shall contain (1) the full name of the child, (2) the manner in which the authorized agency obtained custody of the adoptive child, and (3) the facts, if any, which render unnecessary the consent of either or both of the parents of the adoptive child.

4. None of the papers in the proceeding shall state the surname of the child in the title and no petition, agreement, consent, affidavit, nor any other document which is required to be signed by the adoptive parents shall contain the surname of the adoptive child.

APPENDIX C

Portions of Domestic Relations Law -- State of New York (McKinney's Consolidated Laws of New York (Book 14)).

6. Where the adoptive child is less than eighteen years of age, no order of adoption shall be made until such child has resided with the adoptive parents for at least six months unless the judge or surrogate in his discretion shall dispense with such period of residence and shall recite in the order the reason for such action.

* * * * * * *

APPENDIX C

Domestic Relations Law -- State of New York (McKinney's Consolidated Laws of New York (Book 14)).

§ 114 . Order of Adoption.

If satisfied that the moral and temporal interests of the adoptive child will be promoted thereby the judge or surrogate shall make an order approving the adoption and directing that the adoptive child shall thenceforth be regarded and treated in all respects as the child of the adoptive parents or parent. In determining whether the moral and temporal interests of the adoptive child will be promoted by the adoption, the judge or surrogate shall give due consideration to any assurance by a commissioner of social services that he will provide necessary support and maintenance for the adoptive child pursuant to the social services law. Such order shall contain the full name, date and place of birth of the child in the body thereof. If the judge or surrogate is also satisfied that there is no reasonable objection to the change of name proposed, the order shall direct that the name of the adoptive child be changed to the name stated in the agreement of adoption and that henceforth he shall be known by that name. All such orders made by a family court judge of Westchester county since September first, nineteen hundred sixty-two, and on file in the office of the county clerk of such county shall be transferred to the clerk of the family court of such county. Such order and all the papers in the proceeding shall be filed in the office of the court granting the adoption and

the order shall be entered in books which shall be kept under seal and which shall be indexed by the name of the adoptive parents and by the full original name of the child. Such order, including orders heretofore entered, shall be subject to inspection and examination only as hereinafter provided. The fact that the adoptive child was born out of wedlock shall in no case appear in such order. The written report of the investigation together with all other papers pertaining to the adoption shall be kept by the judge or surrogate as a permanent record of his court and such papers must be sealed by him and withheld from inspection. No certified copy of the order of adoption shall issue unless authorized by court order, except that certified copies may issue to the agency or agencies in the proceeding prior to the sealing of the papers. Before the record is sealed, such order may be granted upon written ex parte application on good cause shown and upon such conditions as the court may impose. After the record is sealed, such order may be granted only upon notice as hereinafter provided for disclosure or access and inspection of records. The clerk upon request of a person or agency entitled thereto shall issue certificates of adoption which shall contain only the new name of the child and the date and place of birth of the child, the name of the adoptive parents and the date when and court where the adoption was granted, which

certificate as to the facts recited therein shall have the same force and effect as a certified copy of an order of adoption.

No person, including the attorney for the adoptive parents shall disclose the surname of the child directly or indirectly to the adoptive parents except upon order of the court. No person shall be allowed access to such sealed records and order and any index thereof except upon an order of a judge or surrogate of the court in which the order was made or of a justice of the supreme court. No order for disclosure or access and inspection shall be granted except on good cause shown and on due notice to the adoptive parents and to such additional persons as the court may direct.

In like manner as a court of general jurisdiction exercises such powers, a judge or surrogate of the court in which the order of adoption was made may open, vacate or set aside such order of adoption for fraud, newly discovered evidence or other sufficient cause. As amended L.1968, c.320, eff. Sept. 1, 1968, c.365; L1968, c.1038, § 4; L.1970, c. 570, § 6, eff. Sept. 1, 1970.

APPENDIX D

Opinion of U.S. District Court, Judge Constance Baker Motley

Plaintiffs have brought this action for a declaratory judgment that they are entitled to notice of all proceedings in which the right to custody of the child Lenore is involved and that in such proceedings they have a right to be heard. They also seek an injunction enjoining defendants from enforcing the judgment of the Supreme Court, New York County, awarding custody of the baby Lenore to defendant Olga Scarpetta and, pending final determination of this action, enjoining defendants from enforcing said judgment.

Plaintiffs, Mr. and Mrs. Nick F. De Martino, residents of Brooklyn, New York, acquired custody of the baby from defendant Spence-Chapin Adoption Service (the agency) on June 18, 1970, one month after she was born out-of-wedlock to defendant Olga Scarpetta on May 18, 1970. Miss Scarpetta presently resides in the Borough of Manhattan but is a citizen of a South American country. Plaintiffs had previously adopted a child from the Spence-Chapin Adoption Service located in Manhattan. They had advised the agency of their desire to adopt another child. The baby Lenore was, therefore, put in plaintiffs' custody by the agency with the understanding that, upon expiration of the probation period, plaintiffs would adopt the baby in compliance with New York law. However, five days after the baby had been placed with plaintiffs by the agency, the baby's natural mother sought to recover her child. She had

placed the baby with the agency four days after the baby's birth. Ten days later, she signed a surrender document surrendering the custody of the child to the agency. On June 23, 1970, Miss Scarpetta notified the agency that she desired to have the child returned to her.

After several unsuccessful oral requests to the agency for her return of her child during July and August 1970, Miss Scarpetta secured counsel and on September 21, 1970 commenced a habeas corpus proceeding against the agency in the Supreme Court, New York County. The only defendant in that proceeding was the agency. Defendant Scarpetta, as required by New York law, did not know the identity of the persons with whom the agency had placed her child for adoption. The DeMartinos had not yet adopted the child. Although the DeMartinos had been made aware by the agency in October 1970 that the habeas corpus proceeding had been commenced, they did not make application to intervene at that time. The agency resisted the action consequently, and a hearing was held on November 2, 1970 at which time witnesses testified and other evidence was received.

After the hearing, the Supreme Court on November 20, 1970 granted the habeas corpus petition and awarded custody of the child to its natural parent. Plaintiffs then sought to intervene. No action was taken on plaintiffs' motion

to intervene by the Supreme Court and after a certain period of time it was deemed denied.

The agency appealed to the Appellate Division, First Department. Plaintiffs moved to intervene. The motion was denied. The judgment of the Supreme Court was affirmed on January 28, 1971.

Upon appeal to the New York Court of Appeals that court, on April 8, 1971, likewise affirmed the trial court. It held that the record adequately supported the determination that the child's best interests were served by awarding custody to its natural mother who had been found fit and competent and financially able to rear her child. People v. Spence-Chapin Adoption Service, Docket No. 79, (April 8, 1971).

The Court of Appeals denied the DeMartino's application to intervene in that appeal but permitted them to file a brief amicus curiae. In denying their application to intervene, the highest court of the State of New York ruled as follows:

> "It cannot be doubted that the public policy of our state is contrary to the disclosure of the names and identitites of the natural parents and prospective adoptive parents to each other.*/

*/ See, e.g., sections 111(4) and 112(4) of the Domestic Relations Law.

APPENDIX D

Opinion of U.S. District Court, Judge Constance Baker Motley

> Sections 383 and 384 of the Social Welfare Law are also reflective of this settled public policy. Since the relationship under section 384 is exclusively between the parent or parents and the adoption agency, and the legislature has not deemed it appropriate for the prospective adoptive parents to be parties to the proceeding pursuant to section 383, the agency acts as an insulating intermediary, ensuring by the separation of the natural parents and prospective adoptive parents the secrecy necessary to prevent the strife and harassment that could be caused by a parent who institutes a proceeding merely to learn the identity of the prospective adoptive parents.
>
> To allow the prospective adoptive parents to intervene as a matter of right, thereby assuming all the rights of other parties to the action, would necessarily lead to disclosure of the names of the natural parents and prospective adoptive parents to each other. In view of the statutory scheme enacted by the legislature, and the settled public policy, we are unwilling to hold that the prospective adoptive parents are entitled to intervene." Id. at 9.

After ruling upon the state law ground, the court then rules upon the merits of DeMartino's claim that denial of the right to intervene and to be heard

violated their federal constitutional right to due process of law guaranteed them by the Fourteenth Amendment to the Federal Constitution.

The Court said:

> "Similarly, we find no merit to the contention that the failure to allow the prospective adoptive parents to intervene in the instant proceeding deprived them of due process of law so as to render the court's determination awarding custody of the child to the mother, constitutionally invalid. The prospective adoptive parents do not have legal custody of the baby. Spence-Chapin, the adoption agency, by virtue of the mother's surrender, was vested with legal custody. (Social Welfare Law, § 383[2]; see also, Matter of Jewish Child Care Assn., 5 N.Y. 2d 222, 229.) The agency, in turn, had placed the baby with the prospective adoptive parents pursuant to an arrangement reached between them, for the purpose of prospective adoption of the child. This arrangement is, of course, subject to our adoption statutes, and in no ways conveys any vested rights in the child to the prospective adoptive parents. (See, e.g., Domestic Relations Law, §§ 112, 114.) It follows, therefore, that, in not being permitted to intervene, they are not deprived of a protected

interest, as contemplated by the Constitution."
Id. 9-10.

Immediately following the decision of the New York Court of Appeals and before a copy of that Court's opinion was available, the DeMartinos commenced this action on April 8, 1971. They sought and secured a temporary restraining order (Metzner, J.) on the ground that when the remittitur of the Court of Appeals is filed with the Supreme Court, Miss Scarpetta will be able to obtain an ex parte order against plaintiffs in aid of enforcement of the judgment of the latter court awarding her custody of her child. A temporary restraining order was, accordingly, entered on April 12, 1971 staying defendants from taking any steps to enforce the order and judgment of the Supreme Court or to remove custody of the child Lenore from plaintiffs until a hearing of plaintiffs' motion for preliminary injunction.

The motion for preliminary injunction came on for hearing before this court on April 20, 1971. At that time, the temporary restraining order was extended for 10 days to give defendant Scarpetta time to submit an additional brief in reply to late papers filed by plaintiffs and until the court could decide the motion.

Defendant Scarpetta opposes the granting

of the motion for preliminary injunction and has filed an answer. Defendant Spence-Chapin Adoption Service has not answered and takes no position on the motion for preliminary injunction. By way of affirmative defense, and in her opposing papers defendant Scarpetta alleges inter alia, that plaintiffs are estopped from asserting their constitutional claim in this Court, pray for dismissal of the complaint and denial of the preliminary injunction.

The question whether plaintiffs had a right to be heard in the habeas corpus proceeding was raised in the state courts. The highest court of the state passed not only on plaintiffs' right to intervene in that action under state law but also passed squarely upon the merits of plaintiffs' federal constitutional claim. Consequently, this court holds that plaintiffs are barred by the doctrine of res judicata from commencing an action in this court in which that same constitutional claim is presented for adjudication. Plaintiffs' remedy is by way of appeal or certiorari to the United States Supreme Court. Angel v. Bullington, 330 U.S. 183 (1947); Brown v. Chastin, 416 F.2d 1012, 1013 (5th Cir. 1969); Deane Hill Country Club, Inc. v. City of Knoxville, 379 F.2d 321, 325 (6th Cir. 1967.) 1/

APPENDIX D

Opinion of U.S. District Court,
Judge Constance Baker Motley

The motion for preliminary injunction is, therefore, denied and the complaint is dismissed.

Dated: New York, New York
April 27, 1971

SO ORDERED

CONSTANCE BAKER MOTLEY
U. S. D. J.

APPENDIX D

Opinion of U.S. District Court,
Judge Constance Baker Motley

FOOTNOTES

1. The fact that Angel v. Bullington concerned a diversity case is not significant for our purposes. The Supreme Court ruled in Angel that the state court had decided a federal constitutional claim. This was a bar to the federal court proceeding not only because of Erie v. Thomkins, 304 U.S. 64 (1938), but because of the principle of res judicata. Angel v. Bullington at 187. See also Hart & Wechsler, The Federal Courts and the Federal System, 668-669 (1953 ed.)

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In The

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1720~~ 70-178

NICK F. DeMARTINO and JEAN DeMARTINO,

Appellants,

vs.

OLGA SCARPETTA and SPENCE-CHAPIN ADOPTION SERVICE,

Appellees.

MOTION TO DISMISS APPEAL FROM STATE COURT

ZALK, RUBEL & PERRET
Attorneys for Appellee
Olga Scarpetta
200 West 57th Street
New York, New York 10019
586-3590

JOSEPH ZALK
Of Counsel

(4511) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850
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Philadelphia, Pa. (215) 563-5587

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Supreme Court of the United States
October Term, 1970

No. 1720

NICK F. DE MARTINO and JEAN DE MARTINO,

Appellants,

v.

OLGA SCARPETTA and SPENCE-CHAPIN ADOPTION SERVICE,

Appellees.

MOTION TO DISMISS

Appellee Olga Scarpetta moves to dismiss the appeal on the following grounds:

1. The judgment of the State Court rests on adequate non-federal grounds.

2. The appeal does not present a substantial federal question.

Statement

The facts of this habeas corpus proceeding and appeals are substantially set forth in the opinion of the Court of Appeals of the State of New York attached to appellants' Jurisdictional Statement at page 16, as Appendix A.

Appellants state (J.S., pp. 1-2) that they are appealing from so much of the final judgment or order of the Court of Appeals of New York as denied the application of the appellants for leave to intervene as parties in the appeal pending before the New York Court of Appeals, and that their appeal also seeks review of so much of the order and remittitur of the Court of Appeals entered April 7, 1971, Appendix A, as affirms the denials by the Supreme Court, New York County and the Appellate Division, First Department, of the Supreme Court of the State of New York, of applications by the appellants herein for leave to intervene in the respective proceedings before those courts.

Appellants apparently do not appeal from those portions of the remittitur of the Court of Appeals, entered April 7, 1971, which affirms the decision of the Appellate Division and the Supreme Court, New York County granting custody of the infant Scarpetta to Appellee Olga Scarpetta (hereinafter referred to as Scarpetta).

Appellants' motion to the New York Court of Appeals to amend the order denying intervention and its remittitur (J.S., p. 3) was denied on or about May 26, 1971.

Statement

The infant Scarpetta, born May 18, 1970, was surrendered for adoption to Appellee Spence-Chapin Adoption Service (hereinafter referred to as Spence-Chapin), on or about June 1, 1970, and on June 18, 1970 Spence-Chapin placed the infant Scarpetta with the appellants for adoption. Five days later, on June 23, 1970, Scarpetta repented her action and requested that her child be returned to her (J.S., p. 18). The infant Scarpetta has never been adopted by the appellants, and contrary to what is stated (J.S., p. 5) custody of the infant Scarpetta has never been in appellants, but was in Spence-Chapin until the order and judgment of the Supreme Court, New York County, dated November 20, 1970 and entered November 24, 1970, which granted custody of the infant Scarpetta to Appellee Scarpetta (Appendix B).

Following the decision and the remittitur of the New York Court of Appeals, a judgment and order was entered on April 28, 1971 directing that the appellants deliver the infant Scarpetta to the appellee, Scarpetta. A copy of said order and judgment of April 28, 1971 is attached hereto as Appendix C.

By order of the Hon. Charles A. Loreto, dated May 27, 1971, and entered May 28, 1971, in the New York County Supreme Court, the appellants were ordered to deliver the infant Scarpetta to the temporary custody of appellee, Spence-Chapin, within forty-eight hours after service of a copy of the said order on their attorneys, and by certified mail to their last known address in New York.

Statement

Said order was served on May 28, 1971. A copy of said order is attached hereto as Appendix D. Appellants have not delivered said infant either to appellee, Scarpetta, or appellee, Spence-Chapin, and are now in contempt of said court order.

According to statements made in the press and on television by the appellants, appellants moved their domicile from Kings County in New York to Florida on or about May 1, 1971, where they presently reside with the infant Scarpetta.

Argument

I.

THE COURT OF APPEALS DECISION WHICH DENIED THE APPELLANTS LEAVE TO INTERVENE IN THE HABEAS CORPUS PROCEEDINGS BETWEEN APPELLEE SCARPETTA AND APPELLEE SPENCE-CHAPIN RESTS ON AN INDEPENDENT NON-FEDERAL GROUND ADEQUATE TO SUPPORT IT.

Appellants sought to intervene in the New York Court of Appeals in the habeas corpus proceeding between appellee Scarpetta, the natural mother of the infant Scarpetta and the appellee Spence-Chapin, the adoption agency to whom she had surrendered her child, as a matter of law pursuant to CPLR 1012(a)(2)(J.S., pp. 28-29). Section 1012(a)(2) of the New York Civil Practice Law and Rules states in part:

Argument

"Upon timely motion, any person shall be permitted to intervene in any action:

* * *

2. When the representation of the person's interest by the parties is, or may be, inadequate, and the person is, or may be, bound by the judgment; or * * *."

The opinion by the Court of Appeals (J.S., p. 29) states that it is contrary to the public policy of the State of New York to disclose the names and identities of the natural parents and the prospective adoptive parents to each other, referring to Sections 111 (4) and 112 (4) of the New York Domestic Relations Law.

The opinion further states that Sections 383 and 384 of the Social Services Law (referred to as the Social Welfare Law in appellants' Jurisdictional Statement) are also reflective of this settled public policy, and that since the relationship under Section 384 is exclusively between the natural parent and the adoption agency, and the legislature has not deemed it appropriate for the prospective adoptive parents to be parties to the proceeding pursuant to Section 383, the agency acts as an insulating intermediary, insuring, by the separation of the natural parents and the prospective adoptive parents, the secrecy necessary to prevent the strife and harrassment that could be caused by a parent who institutes a proceeding merely to learn the identity of the prospective adoptive parents.

The opinion further points out (J.S., pp. 29-30) that to allow the prospective adoptive parents to intervene as a matter of right, thereby assuming all the rights of other parties to the action, would necessarily lead to the disclosure of the names of the natural parents and the prospective adoptive parents to each other, which is contrary to the public policy of the State of New York.

This same principal has been enunciated by the Appellate Division, Third Department of the State of New York in the case of People ex rel. Anonymous v. Saratoga County Dept. of Pub. Welfare, 30 A.D. 2d 756, 291 N.Y.S. 2d 536 (1968), where the court stated that foster parents had no standing to intervene in a habeas corpus proceeding brought by the natural mother to compel the return of a child from a foster parent, because until formal adoption occurred, the relationship under Social Services Law, Section 384 is exclusively between the parent or parents and the agency, and the sole issue involved is the fitness and ability of the parent, without any consideration with respect to the prospective adoptive parent.

Parenthetically, although appellants state (J.S., p. 6) that upon discovery of the New York Supreme Court's determination as to custody, they made application, first to Mr. Justice Ascione, who heard the habeas corpus proceeding in the New York Supreme Court, and then to the Appellate Division, First Department, for leave to intervene in the proceedings, no such applications were ever served upon the attorneys for appellee, Scarpetta.

Argument

II.

THE APPEAL HEREIN DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Appellants argue (J.S., p. 10) that the New York Court's refusal to allow appellants to intervene in the habeas corpus proceeding between appellee, Scarpetta, and appellee, Spence-Chapin, violates the Due Process clause of the Fourteenth Amendment of the United States Constitution.

The opinion of the Court of Appeals of the State of New York (J.S., pp. 30-31) states that the Court found no merit in the contention that the failure to allow the prospective adoptive parents to intervene in the habeas corpus proceedings deprived them of due process of law, because the prospective adoptive parents do not have legal custody of the baby. Legal custody of the baby was vested in appellee, Spence-Chapin, by virtue of the surrender executed by the appellee, Scarpetta. Spence-Chapin had placed the baby with the appellants, who had at best provisional custody. This arrangement, as was pointed out by the Court of Appeals, is subject to the adoption statutes of the State of New York, and in no way conveys any vested rights in the child to the prospective adoptive parents, who are not deprived of a protected interest as contemplated by the Constitution by the refusal to permit them to intervene in the habeas corpus proceedings.

Argument

In support of their argument of a violation of the Due Process clause of the Fourteenth Amendment, appellants cite Armstrong v. Manzo, 380 U.S. 545 (1965). The Armstrong case is clearly inapplicable. In that case the adoption law of the State of Texas required the natural father's written consent to adoption proceedings, with certain exceptions. After Armstrong and his wife were divorced, his wife married Manzo, who sought to adopt Mr. Armstrong's daughter. No notice of the adoption proceedings was given to Armstrong. The United States Supreme Court held that the failure to give the petitioner, Armstrong, notice of the adoption proceedings violated the most fundamental demands of due process of law.

Section 111 of the New York Domestic Relations Law states that the consent of the parent is required in adoption proceedings. This is similar to the Texas law in the Armstrong case, but Section 111 of the New York Domestic Relations Law does not state that notice has to be given to proposed adoptive parents who have no standing in the State courts, only to natural parents.

Section 112 of the Domestic Relations Law of the State of New York governs adoptions from an authorized agency, as in the instant case. This section provides specifically that none of the papers in the proceedings shall state the surname of the child in the title, and that none of the papers required to be signed by the adoptive parents shall contain the surname of the adopted child. To further illustrate the intention of the New York State Legislature to keep the identity of the

natural parents and proposed adoptive parents secret from each other, Section 114 of the Domestic Relations Law of the State of New York requires that no person, including the attorney for the adoptive parents, shall disclose the surname of the child, directly or indirectly to the adoptive parents, except upon order of the Court.

Section 383 of the Social Services Law, subdivision 2, of the State of New York, formerly the Social Welfare Law, states that the custody of a child placed out or boarded out, and not legally adopted, shall be vested during his minority in the authorized agency placing out or boarding such child, and any such authorized agency may in its discretion remove such child from the home or place where boarded.

From the foregoing it would therefore appear that in bringing a habeas corpus proceeding to regain custody of her child, appellee, Scarpetta, could only bring such action against the adoption agency which had custody of the child, and in fact appellee, Scarpetta, as the natural mother, would not know the identity of the proposed adoptive parents under the New York Domestic Relations Law.

The Armstrong case therefore is not applicable, because under Texas law, as under New York law, the natural parent has to be notified of adoption proceedings. There is no such requirement of notice to proposed adoptive parents. Adoptive parents under the New York Domestic Relations Law have no rights until the child is

legally adopted, and the infant Scarpetta has never been legally adopted.

It has been previously pointed out that proposed adoptive parents have no standing in habeas corpus proceedings instituted in the state court by a natural mother against an authorized adoption agency. (See People ex rel. Anonymous v. Saratoga County Dept. of Pub. Welfare, supra.)

The case of Goldberg v. Kelly, 397 U.S. 254 (1970) (J.S., p. 15) cited by appellants is also inapplicable because in the Goldberg case the United States Supreme Court held that the right to receive welfare benefits was an interest protected under the Due Process clause of the Fourteenth Amendment, and that welfare recipients were therefore entitled to a hearing before termination of welfare benefits. In the instant case, appellants have no such protected interest.

In Boone v. Wyman, D.C.N.Y. 1969, 295 F. Supp. 1143, affirmed 412 F.2d 857, certiorari denied 90 S. Ct. 600, 396 U.S. 1024, it was held by the United States District Court for the Southern District of New York that the New York Supreme Court is vested with sole jurisdiction to determine the custody of minor children in the State of New York, and that no substantial federal question was involved.

Conclusion

For all of the foregoing reasons Appellee Scarpetta moves that this appeal be dismissed.

Respectfully submitted,

Joseph Zalk,
Counsel for Appellee, Olga Scarpetta.

APPENDIX A

Remittitur

STATE OF NEW YORK, SS:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of April in the year of our Lord one thousand nine hundred and seventy-one, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

Remittitur April 7, 1971

1. No. 79. 71
The People &c., ex rel. Olga Scarpetta on behalf of Baby Scarpetta,
Respondent,
vs.
Spence-Chapin Adoption Service,
Appellant.

BE IT REMEMBERED, That on the 26th day of February in the year of our Lord one thousand nine hundred and seventy-one, Spence-Chapin Adoption Service, the appellant — in this cause,

came here unto the Court of Appeals, by Simpson, Thacher & Bartlett, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Olga Scarpetta on behalf of Baby Scarpetta, the respondent — in said cause, afterwards appeared in said Court of Appeals by Zalk, Rubel & Perret, her attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Roy L. Reardon, of counsel for the appellant, and by Mr. Joseph Zalk, of counsel for the respondent, and by Mr. Jacob D. Fuchsberg, of counsel for the amici curiae De Martino, two other briefs filed by amici curiae, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, without costs, as aforesaid,

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of

Remittitur

the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

s/ Raymond J. Cannon
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,

Albany, April 7, 1971.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(SEAL)

s/ Raymond J. Cannon
Clerk

APPENDIX B

Order and Judgment Appealed From

At a Special Term, Part XII of the Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse in the County of New York on the 20th of November, 1970.

Present:

HON. ALFRED M. ASCIONE,

Justice.

THE STATE OF NEW YORK, ex rel. OLGA SCARPETTA, on behalf of BABY SCARPETTA,

Petitioner,

-against-

SPENCE-CHAPIN ADOPTION SERVICE,

Respondent.

The Writ of Habeas Corpus issued by the Honorable Arnold L. Fein, Justice of the Supreme Court of the State of New York, County of New York, on the 21st day of September, 1970, having come on for hearing at a Special Term, Part XII of this Court on the 2nd day of November, 1970, and a hearing having been held upon said Writ of Habeas Corpus on the 2nd day of November,

1970, and the Petitioner herein, having appeared herein by its attorneys, Zalk, Rubel and Perret, Joseph Zalk, Esq., of counsel, and the Respondent herein, having appeared herein by its attorneys, Simpson Thacher & Bartlett, Roy L. Reardon, Esq., and James Wawro, Esq., of counsel, and the proofs of all parties having been taken and their respective counsels having been heard, and the Court, after due deliberation, having made and filed a decision in writing dated November 16, 1970, awarding custody of Baby Scarpetta to the Petitioner, Olga Scarpetta, from the custody of the Respondent, The Spence-Chapin Adoption Service,

AND, upon reading and filing the aforesaid Writ of Habeas Corpus, the Petition of Olga Scarpetta, sworn to September 18, 1970, and the Return of the Respondent, The Spence-Chapin Adoption Service, duly sworn to on the 27th day of October, 1970, by Loyce W. Bynum, and Petitioner's Exhibit 1 and Respondent's Exhibit A (consisting of 3 papers);

Now, upon motion of Simpson, Thacher & Bartlett, attorneys for the Respondent herein, it is

ORDERED, ADJUDGED AND DECREED that the writ is sustained and Respondent The Spence-Chapin Adoption Service, surrender to the Petitioner, Olga Scarpetta, the infant, Baby Scarpetta, and it is further

ORDERED, ADJUDGED AND DECREED that the execution of this judgment be stayed pending the

determination of the appeal of The Spence-Chapin Adoption Service from this judgment, to the Appellate Division, First Department, on condition that such appeal is perfected for the next available term of such Court, on consent by stipulation dated November 19, 1970.

ENTER,

A.M.A.
J.S.C.

Norman Goodman
Clerk

FILED
NOV 24 1970
County Clerk's Office
New York

APPENDIX C

Order and Judgment

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

- -x

The State of New York ex rel. OLGA SCARPETTA, on behalf of BABY SCARPETTA,

Petitioner,

-against-

SPENCE-CHAPIN ADOPTION SERVICE,

Respondent.

- -x

SPENCE-CHAPIN ADOPTION SERVICE, the respondent above named, having appealed to the Court of Appeals from an order of the Appellate Division, First Department, entered in the office of the Clerk of the Appellate Division on January 28, 1971, which order affirmed an order and judgment of the Supreme Court, New York County, entered in the office of the Clerk of the County of New York on November 24, 1970, sustaining the petitioner's writ of habeas corpus, and directing that the respondent SPENCE-CHAPIN ADOPTION SERVICE surrender to the petitioner OLGA SCARPETTA the infant BABY SCARPETTA; and the Court of Appeals having, by an order entered in the office of the Clerk of said Court of Appeals

on April 7, 1971, affirmed the said order of the Appellate Division without costs; and the remittitur of the Court of Appeals having been duly filed herein;

NOW, on motion of Zalk, Rubel & Perret, attorneys for the petitioner herein, it is

ORDERED, ADJUDGED AND DECREED that the respondent SPENCE-CHAPIN ADOPTION SERVICE and NICK F. DE MARTINO and JEAN DE MARTINO, the persons with whom the infant BABY SCARPETTA presently resides, surrender to the petitioner OLGA SCARPETTA said infant BABY SCARPETTA, on May 3rd, 1971 at 10:00 A.M. in Special Term, Part XII, Supreme Court, New York County, 60 Centre Street, New York, New York.

ENTER

s/ Alfred M. Ascione
J.S.C.

NORMAN GOODMAN
Clerk

FILED
APR 28 1971
Co. Clerk's Office
New York

APPENDIX D

Order

At a Special Term, Part XII of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 60 Centre Street, New York, New York on May 27th 1971.

P R E S E N T:

CHARLES A. LORETO,

Justice.

Index No. 34102/70

(Same Title)

The Petitioner, having moved this Court by an order to show cause granted May 6, 1971 and returnable May 11, 1971, and by a supplementary order to show cause granted May 7, 1971 returnable May 13, 1971, for an order punishing NICK F. DE MARTINO and JEAN DE MARTINO for contempt for their willful disobedience of, and non-compliance with, the order and judgment of Mr. Justice Alfred M. Ascione, made November 20, 1970 and entered November 24, 1970, ordering that respondent SPENCE-CHAPIN ADOPTION SERVICE surrender to the petitioner OLGA SCARPETTA, the infant BABY SCARPETTA, and the order and judgment of Mr. Justice Alfred M. Ascione, made and entered April 28, 1971, directing that the respondent SPENCE-CHAPIN ADOP-

TION SERVICE and NICK F. DE MARTINO and JEAN DE MARTINO surrender the infant, BABY SCARPETTA, to the petiioner, OLGA SCARPETTA, on May 3, 1971 at 10:00 A.M. in Special Term, Part XII of the Supreme Court, New York County, 60 Centre Street, New York, New York, in that NICK F. DE MARTINO and JEAN DE MARTINO, the persons with whom the said BABY SCARPETTA resides, have failed to obey and violated the provisions of the said orders and judgments, and said motion having regularly come on to be heard on May 13, 1971,

NOW, on reading and filing the said orders to show cause granted May 6, 1971 and May 7, 1971, the affirmations of Joseph Zalk, one of the attorneys for the petitioner herein, dated May 6, 1971 and May 7, 1971, the orders and judgments of Mr. Justice Alfred M. Ascione dated November 20, 1970 and April 28, 1971, all submitted in support of petitioner's motion, and upon the affirmation of Jacob D. Fuchsberg, dated May 11, 1971, of Fuchsberg and Fuchsberg, the attorneys for NICK F. DE MARTINO and JEAN DE MARTINO, submitted in opposition to the said motions, and after hearing counsel for both sides, and after having been advised by Jacob D. Fuchsberg, one of the attorneys for NICK F. DE MARTINO and JEAN DE MARTINO, in Chambers on May 24, 1971, that NICK F. DE MARTINO and JEAN DE MARTINO have left the State of New York with the said BABY SCARPETTA, and their attorney stated that they are no longer domiciled in the State of New York, and their whereabouts is unknown and was not disclosed, and due delibera-

tion having been had therein, and upon filing the written decision of the Court,

NOW, on motion of Zalk, Rubel & Perret, the attorneys for the petitioner, it is

ORDERED, ADJUDGED AND DECREED that the motion to punish NICK F. DE MARTINO and JEAN DE MARTINO for contempt of Court be granted to the following extent; and it is further

ORDERED, ADJUDGED AND DECREED that NICK F. DE MARTINO and JEAN DE MARTINO shall return the said BABY SCARPETTA forthwith within forty-eight hours from the date of service as herein specified to the temporary custody of the SPENCE-CHAPIN ADOPTION SERVICE, 6 East 94th Street, New York, New York, the said BABY SCARPETTA to be held in the temporary custody of the SPENCE-CHAPIN ADOPTION SERVICE subject to the further order of this Court; and it is further

ORDERED, ADJUDGED AND DECREED that service of a copy of this order with notice of entry shall be made upon Fuchsberg & Fuchsberg, 250 Broadway, New York, New York, the last attorneys of record for NICK F. DE MARTINO and JEAN DE MARTINO, and by certified mail upon NICK F. DE MARTINO and JEAN DE MARTINO at their last known home address at 8216 10th Avenue, Brooklyn, New York; and said service shall be sufficient, and it is further

ORDERED, ADJUDGED AND DECREED that upon the filing of affidavit of a party hereto or

his attorney of non-compliance with the provisions of this order, the respondents hereby be adjudged guilty of contempt of this court in having wilfully disobeyed its provisions; and it is further

ORDERED, ADJUDGED AND DECREED under Section 750 of the Judiciary Law of the State of New York, as punishment for said contempt, pursuant to Section 851 of said statute, the said Nick P. De Martino and Jean De Martino be imprisoned in the County Jail for a period of thirty (30) days; and it is further

ORDERED, ADJUDGED AND DECREED upon the filing of affidavit of non-compliance with the provisions of this order by said Nick F. De Martino and Jean De Martino, an order of commitment may issue ex parte to the Sheriff of any county of the State of New York or of the City of New York in which they may be found, directing the said Sheriff to detain said Nick P. De Martino and Jean De Martino in his custody in the common jail of any county, and to be kept therein until their compliance with the terms of this order, or until otherwise discharged by law.

ORDERED that this order or decree may be enforced or modified only in the Supreme Court.

ENTER

s/ C.A.L.
J. S. C.

s/ Norman Goodwin
Clerk